SUPREME COURT, U. S.
FILED
MAY 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1393

THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO "PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT"

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INTRODUCTION

Come now respondents, GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D., plaintiffs in the original action before the United States District Court for the Eastern District, Eastern Division, of Missouri and successful appellants before the United States Court of Appeals for the Eighth Circuit, and pursuant to Rule 24 of this Honorable Court file this, their "Brief" in opposition to the granting of a writ of certiorari in this cause.

ARGUMENT

I

The Appellate Court Correctly and Properly Held That Respondents Had Proper Standing, on Their Own Behalf and on Behalf of Their Pregnant Patients Desiring to Terminate Their Pregnancies, to Challenge the Constitutionality of Missouri Revised Statute, Section 208.152(12)

The Appellate Court correctly and properly determined, without dissent, that respondent physicians had adequate standing to challenge the restrictive state statute, herein challenged. As the Appellate Court so succinctly held,

> "The statute in question interferes with the doctor-patient relationship as it relates to the abortion decision. It injects unnecessarily restrictive rules upon a constitutionally protected decision of doctor and patient as surely as did the statutes in the above cited cases. The statute interferes with the appellants' practice of medicine both professionally and monetarily." (*Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211, 1214 [8th Cir. 1974]).

It has been repeatedly held in abortion regulation cases that physicians are parties with proper standing before the courts. As early as 1971 the federal court in *Doe*, et al. v. *Scott*, et al., 321 F.Supp. 1385, 1387-1388 (N.D.Ill. 1971) held,

> "[T]he physician-plaintiffs have standing to raise the claims of their patients even if we assume that no independent claim of theirs could withstand a motion for judgment on the pleadings. All plaintiffs thus have standing to raise the claims they assert."

Even more compelling is this Honorable Court's treatment of this very issue in the historic cases of *Roe*, et al. v. *Wade*, 410

U.S. 113 (1973), and *Doe*, et al. v. *Bolton*, et al., 410 U.S. 179 (1973), where it was stated,

> "[T]he physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." (410 U.S. at p. 188).

The principle of physicians' standing in abortion regulation cases has not been limited by the courts merely to regulations invoking criminal sanctions for noncompliance; but the same principle has been applied equally to cases such as here, where the noncriminal regulation interferes with the protected physician-patient relationship and unconstitutionally inhibits the free election and effectuation of an abortion. (See, *e.g.*: *Doe*, et al. v. *Bellin Memorial Hospital*, et al., 479 F.2d 756 [7th Cir. 1973]; *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 [8th Cir. 1974], *cert. denied*, 42 L.Ed. 2d 136 [1974]; *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 [D.Neb. 1974]; *Roe*, et al. v. *Ferguson*, et al., 389 F.Supp. 387 [S.D. Ohio 1974], *reversed on other grounds*, — F.2d — [6th Cir., No. 74-2195, April 28, 1975]; and *Hallmark Clinic*, et al. v. *North Carolina Department of Human Resources*, et al., 380 F.Supp. 1153 [E.D.N.C. 1974]).

The court in *Nyberg*, *supra*, reasoned as follows:

> "We think that the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe

v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) has clearly paved the way for physicians to assert their constitutional rights to practice medicine, which now includes the right to advise and perform abortions. . . .

"The impact of the court's discussion cannot be fairly said to limit standing to sue in abortion cases to pregnant women. Neither can these opinions be read so narrowly as to accord standing only to a physician threatened with criminal prosecution. *See* Doe v. Bolton, *supra* at 188-189 of 410 U.S., 93 S.Ct. 739. Clearly the claims of medical doctors to 'freely practice medicine according to the highest medical standards without arbitrary outside restraints' are inextricably bound up with the privacy rights of women who seek abortions. YWCA v. Kugler, 342 F.Supp. 1048, 1055 (D.N.J.1972). This is sufficient to present a justiciable controversy and confer standing on the physicians who bring this action. . . . Furthermore, the practical effect of the stringent limitation on the use of hospital facilities for performing abortions is to arbitrarily bar the physicians from activities that directly affect their economic interests." (495 F.2d at p. 1344).

In *Nyberg, supra*, the Appellate Court held physicians had the requisite standing to challenge the refusal of a public hospital to allow abortions within their facilities, which policy effectively denied abortions to indigent women. No logical distinction can be drawn between the standing of physicians, on behalf of their indigent patients, to challenge the denial to them of abortions through the arbitrary exclusion of the procedure from the broad range of medical services governmentally offered to indigents at a particular physical facility; and their standing, on behalf of their indigent patients, to challenge the denial to them of abortions through the arbitrary exclusion of the procedure from the broad range of medical services governmentally financed and paid on behalf of indigents. Upon close examination, it is apparent that respondents in the present cause manifest a greater logical nexus than did physician-plaintiffs in *Nyberg, supra*, by reason of their more, direct pecuniary benefit through state financed payment.

This type of a "standing" interest has been held sufficient, time and time again, by this Honorable Court. (See, *e.g., Association of Data Processing Service Organizations, Inc.*, et al. v. *Camp*, etc., et al., 397 U.S. 150, 151-156 [1970]; *Arnold Tours, Inc.*, et al. v. *Camp*, et al., 400 U.S. 45, 46 [1970]; and *Investment Company Institute*, et al. v. *Camp*, etc., et al., 401 U.S. 617, 620-621 [1971]).

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values. Scenic Hudson Preservation Conf. v. FPC, 354 F2d 608, 616; Office of Communication of United Church of Christ v. FCC, 123 US App DC 328, 334-340, 359 F2d 994, 1000-1006. A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. Abington School District v. Schempp, 374 US 203, 10 L Ed 2d 844, 83 S Ct 1560. We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here. Certainly he who is 'likely to be financially' injured, FCC v. Sanders Bros. Radio Station, 309 US 470, 477, 84 L Ed 869, 875, 60 S Ct 693, may be a reliable private attorney general to litigate the issues of the public interest in the present case.

* * * * * * *

> Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend. In a closely analogous case we held that an existing entrepreneur had standing to challenge the legality of the entrance of a newcomer into the business, because the established business was allegedly protected by a valid city ordinance that protected it from unlawful competition. Chicago v. Atchison, T. & S. F. R. Co." (*Association of Data Processing*, etc., *supra*, at pp. 153-154).

Respondents maintain that their standing is ample and sufficient in this cause. Respondents' claim is primarily based upon the interference here by the state in the constitutionally protected area of the decision regarding abortion between a patient and her physician. The procedure of abortion cannot be viewed in the same light as other medical and surgical procedures. It alone has been afforded constitutional guarantees shared by patient and physician.

Respondents have not only the right but the obligation to protect the rights of their patients. The challenged statute, as evidenced by the reasoning expressed in an unanimous line of cases, voiding identical provisions in other states, must be viewed as part of a larger legislative effort to thwart the free exercise by a woman and her physician of this choice.

Petitioner suggests that the standards enunciated in *Tileston* v. *Ullman*, et al., 318 U.S. 44 (1943), *Barrows*, et al. v. *Jackson*, 346 U.S. 249 (1953), and *National Association for the Advancement of Colored People* v. *State of Alabama*, etc., 357 U.S. 449 (1958), are controlling. ("Petitioner's Writ" [P.W.] p. 9). Respondents suggest instead that the standards of thirty-two (32) years, twenty-two (22) years and seventeen (17) years ago, respectively, have been altered and broadened by the authorities cited herein both *supra* and *infra*.

Respondents, as so found by the Appellate Court, clearly meet the standard prescribed by *Flast*, et al. v. *Cohen*, etc., et. al., 392 U.S. 83, 102 (1968), that there exists "a logical nexus between the status asserted and the claim sought to be adjudicated". Assuming *arguendo* the fact that hypothetical plaintiffs may exist, who also have standing and even an assumed greater "logical nexus", does not preclude respondent physicians from maintaining their own and distinct requisite standing.

This Honoroble Court in *Flast*, *supra*, stated,

> "The various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated. We have noted that, in deciding the question of standing, it is not relevant that the substantive issues in the litigation might be nonjusticiable. However, our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between status asserted and the claim sought to be adjudicated." (392 U.S. at pp. 101-102).

The physician-respondents demonstrably evidence such a "logical nexus" in various and distinct ways.

First, is the vitality of the inseparability of the doctor-patient relationship into its two component parts. This is particularly true in the area of abortion, where this Honorable Court placed great emphasis upon the physician in stating that,

> "[F]or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." (*Roe*, *supra*, at p. 163).

Secondly, in addition to the physician-patient relationship on the medical level, physicians have a direct pecuniary interest in receiving payment for services rendered. Payments for medicaid assistance are "made *on behalf* of those eligible needy persons" (Emphasis supplied). (Mo.R.S., Section 208.152). The arbitrary and capricious exclusion of abortion from the Missouri medicaid program unduly regulates and interferes with the physician-respondents' practice of medicine.

Thirdly, the joint decision making process between the patient and her physician is impermissibly invaded by the state's flexing of its welfare assistance muscle.

Lastly, is the equitable necessity of allowing physicians to absorb the expenses of time, energy and monies on behalf of their indigent patients, who are often uneducated and incapable of adequately defending these sacred rights in their own stead. The history of cases in which women have been plaintiffs is replete with names like Doe, Roe, Coe, Poe, etc., in an effort to maintain their anonymity as to their public involvement with a highly, emotionally charged issue.

Truly, it cannot be said that respondents have an illogical nexus between the status asserted and the claim sought to be adjudicated. As indicated above, the existence of potential plaintiffs, hypothetically bearing a *more* "logical nexus" than respondents, does not reflect unfavorably upon respondents maintaining a "logical nexus" in their own right.

In the analogous context of lawyer and client, it has similarly been held,

> "At issue in the merits of the case (not yet determined) is the right of members of the Committee to provide effective assistance of counsel to their Indian clients who wish to avail themselves of their Sixth Amendment rights. Appellees' contention that the Committee has not alleged an

> actual injury sufficiently personal to present a justiciable case or controversy cannot stand in light of our decision in Nyberg v. City of Virginia, 495 F.2d 1342, 1344 (8th Cir. 1974), wherein we held that the rights of medical doctors to freely practice medicine are so 'inextricably bound up' with the privacy rights of their patients that the doctors have standing to challenge the validity of abortion laws. *See also* Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). With even stronger force it may be said that a lawyer has standing to challange any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel." (*Wounded Knee Legal Defense/Offense Committee*, et al. v. *The Federal Bureau of Investigation*, et al., 507 F.2d 1281, 1284 [8th Cir. 1974]).

One salient fact remains to be noted; petitioner has not cited to this Honorable Court a single abortion regulation case in which physicians were held not to have adequate standing to challenge the attempted infringement of their rights and the rights of their patients, while respondents have cited numerous cases to the contrary.

II

The Appellate Court Correctly and Properly Ruled Upon the Merits of This Cause in Full Accordance With Judicial Equity and Economy; and Petitioner Had More Than Ample Opportunity to Defend Upon the Merits, But Choosing Not to Do So Waived and Foreclosed Himself of the Opportunity Then Presented

Respondents do not quarrel with the general principles of law cited by petitioner, that ordinarily matters will not be

reached on appeal that have not been decided below and that constitutional questions should not be first considered on appeal. (P.W. p. 12). Nevertheless, even those cases cited by petitioner for the former rule clearly recognize the principle not to be an absolute one, but only one applied "ordinarily" (*Eureka-Carlisle Company* v. *Rottman*, etc., 398 F.2d 1015, 1019 [10th Cir. 1968], one the court may choose to follow by "declin(ing)" to reach the merits (*Equal Employment Opportunity Commission* v. *Standard Forge and Axle Company, Inc.*, 496 F.2d 1392, 1394 [5th Cir. 1974]), and one to be discretionally not "considered" (*Fitts* v. *United States of America*, 376 F.2d 516 [10th Cir. 1967]); all cited by petitioner. (P.W. p. 12). In none of the cases cited by petitioner was the questioned, appellate issue in any manner before the District Court. Contrarily, in the instant case the merits were presented directly to the District Court which chose not to confront them.

Similarly, in *Giordano* v. *United States*, 394 U.S. 310 (1969), *Bandy* v. *United States of America*, 396 F.2d 929 (8th Cir. 1968) and *Gardner* v. *Meyers*, et al., 491 F.2d 1184 (8th Cir. 1974), all cited by petitioner (P.W. pp. 12-13), the constitutional issue was never raised nor presented to the District Court. In the present cause the constitutional issue was squarely and exclusively before the District Court.

It has long been a general rule of law that appellate courts in cases involving clear and unequivocal issues, capable of only a singular determination, may decide the matter on the merits rather than remanding the same.

In *Levin* v. *Mississippi River Fuel Corporation*, et al., 386 U.S. 162 (1967) involving a construction of Missouri state law and which arose within the Eighth Circuit, this Honorable Court stated,

> "Indeed, this point is so clear that we see no occasion for remanding the issue to the Court of Appeals for its consideration of the point, even though it be assumed its opinion does not decide it. Effective judicial administration requires that we dispose of the matter here." (386 U.S. at pp. 169-170).

In *Hurwitz*, et al. v. *Directors Guild of America, Incorporated*, 364 F.2d 67 (2nd Cir. 1966), *a case on appeal from an order denying plaintiffs' request for a preliminary injunction*, the Court of Appeals reversed, holding for plaintiffs on the merits.

> "As a general rule, when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal. See Ex parte National Enameling & Stamping Co., 201 U.S. 157, 162, 26 S.Ct. 404, 50 L.Ed. 707 (1906); Drittel v. Friedman, 154 F.2d 653 (2 Cir. 1946); Sheldon v. Moredall Realty Corp., 95 F.2d 48 (2 Cir. 1938); 6 Moore, Federal Practice ¶ 54.08 [1] (2 ed. 1965). However, this rule is subject to a general exception—the appellate court may dismiss the complaint on the merits if its examination of the record upon an interlocutory appeal reveals that the case is entirely void of merit. See, e.g., Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 495, 20 S.Ct. 708, 44 L.Ed. 856 (1900); Sheldon v. Moredall Realty Corp., supra; 7 Moore ¶ 65.21, at p. 1702 (2 ed. 1955).
>
> Such an exception serves the obvious interest of economy of litigation, and this interest is equally served if the appellate court directs a verdict for plaintiff in an appropriate case. We have found no case reaching this result, but this is not surprising since it is the rare case that contains no triable issue of fact, and it is rarer still that this would result in a judgment for the plaintiff at the pre-trial stage. In Meccano, Ltd. v. John Wanamaker, 250 F. 450 (2 Cir. 1919), aff'd, 253 U.S. 136, 141-142, 40 S.Ct. 453,

64 L.Ed. 822 (1920), we expressly refused to pass upon this question because the plaintiff did not warrant final relief. Finding no reason why the cautious exercise of such a power would be undesirable, we conclude that we may direct the entry of a judgment for the plaintiffs here." (364 F.2d at p. 70).

In point is *The Board of Managers of the Arkansas Training School for Boys at Wrightsville*, et al. v. *George*, et al., 377 F.2d 228 (8th Cir. 1967). The Appellate Court decided the merits on appeal and held,

"It would clearly be a 'contradiction of reason' to attempt to enjoin the state from enforcement of a statute and at the same time not pass upon the constitutionality of the statute. Cf. United States ex rel. McNeill v. Tarumianz, 3 Cir., 242 F.2d 191. Moreover it is not necessary to attack statutes by specific pleading which on their face are unconstitutional. Turner v. City of Memphis, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762.

We are also mindful that the present appeal comes to us on a motion to dismiss with a limited record. *Appellant has not even filed its answer.* We adhere to the proposition that it would be improper to consider 'grave constitutional questions' where there exists 'reasonable likelihood' that further proceedings could help clarify the issues. Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, at 213, 55 S.Ct. 187, 79 L.Ed. 281. However, in the present proceeding no further pleadings or evidence is necessary for 'refinement or clarification of issues.' United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877; United States v. Fabro, Inc., M.D. Ga., 206 F.Supp. 523. And we should dispose of all controversies 'as expeditiously as is consistent with proper judicial administration.' Turner v. City of Memphis, 369

U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762." (Emphasis supplied). (377 F.2d at p. 231).

Similarly, is *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349 (8th Cir. 1974), in which an unanimous panel similarly ruled statutory abortion restrictions to be facially unconstitutional, although the cause below had been discussed without a ruling on the merits.

"The issue in this case relates to the facial constitutionality of the St. Louis city ordinance when viewed against the backdrop now available in the *Roe* and *Doe* decisions. That determination can be made on the record before us. We choose to make that determination. See, *Wisconsin* v. *Constantineau*, *supra* at 439 of 400 U.S., 91 S.Ct. 507; Baggett v. Bullitt, 377 U.S. 360, 375-379, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964)." (495 F.2d at p. 1350).

The Appellate Court in this cause was not unmindful of the prior district court's history regarding abortion litigation in Missouri, nor has this Honorable Court similarly been unaware of same.

Such cases, challenging the constitutionality of state and municipal regulation within the United States District Court for the Eastern District of Missouri, Eastern Division, subsequent to *Roe*, et al. v. *Wade*, *supra*, and *Doe*, et al. v. *Bolton*, et al., *supra*, are pertinent and revealing. (See *e.g.*: *Word*, et al. v. *Poelker*, etc., et al. [municipal regulation of abortion clinics], *dismissed on ground of abstention*, — F.Supp. — [E.D. Mo., No. 73C533(2), Oct. 4, 1973], *reversed on the merits*, 495 F.2d 1349 [8th Cir. 1974]; *Doe*, et al. v. *Poelker*, etc., et al. [public hospitals' prohibition on abortion], *dismissed for lack of standing*, — F.Supp. — [E.D. Mo., No. 73C565 (A), Mar. 22, 1974], *reversed*, 497 F.2d 1063 [8th Cir.

1974], *dismissed on the merits,* — F.Supp. — [E.D. Mo., No. 73C565(A), Jan. 13, 1975], *reversed on the merits,* — F.2d — [8th Cir., No. 75-1069, Apr. 14, 1975]; *Wulff,* et al. v. *State Board of Registration for the Healing Arts,* et al. [medicaid exclusion of benefits for abortion], *dismissed for lack of standing,* 380 F.Supp. 1137 [E.D. Mo. 1974], *reversed on the merits sub nom. Wulff,* et al. v. *Singleton,* etc., 508 F.2d 1211 [8th Cir. 1974]; and *Planned Parenthood of Central Missouri,* et al. v. *Danforth,* etc., et al. [upholding the constitutionality of a recently enacted state statute], — F.Supp. — [E.D. Mo., No. 74-416(A), Jan. 31, 1975], *stayed and enjoined,* 43 L. Ed.2d 389 [No. A-656, Feb. 18, 1975], *docketed,* 43 L.W. 3502 [No. 74-1151, Mar. 12, 1975]).

The tragedy of this legislative pattern and judicial experience is the existence of its provisions during the time necessary to obtain favorable appellate decisions. Every Missouri case to date has been often summarily and always adversely disposed of by the district court and preliminary injunctive relief denied. Every said case has been reversed or enjoined upon appeal.

The rule has always been that "(o)nce a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it" and "once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." (*Moore's Federal Practice,* Vol. 9, Section 110.25[2], p. 273 [1973]). (See, also, *Mercury Motor Express, Inc.,* et al. v. *Brinke,* 475 F.2d 1086 [5th Cir. 1973]).

The intent and purpose of 28 U.S.C., Section 2281 have not been impaired nor defeated by the action of the Appellate Court, inasmuch as three federal judges have sat in judgment on the constitutional merits involved and no injunction has been issued. Additionally applicable here is this Honorable Court's language that,

"While Section 2281 calls for three judges to enjoin a statute 'upon the ground' of its 'unconstitutionality,' we have held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent . . ." (*Gonzalez* v. *Automatic Employees Credit Union,* et al., 42 L.Ed. 2d 249, 256-257, fn. 14 [1974]).

III

The Appellate Court Correctly and Properly Ruled Upon the Merits of This Cause in Full Accordance With Prior Decisions of This Honorable Court and in Full Accordance With All Other Federal Courts Having Ruled Upon the Same or Analogous Issues

In "Questions Presented" Nos. 3, 4 and 5 of petitioner's "Petition For a Writ" (P.W. pp. 2, 3 and 14-20), petitioner attempts at this stage of the proceedings to argue belatedly the merits of the cause. Although the constitutional merits on appeal were the primary issue, as petitioner well knew, as they were extensively briefed and denominated as "Point I" of *Appellants' Statement, Brief and Argument* filed with the appellate court and duly served upon petitioner, he voluntarily chose not to make nor to defend an argument on the merits before the Appellate Court, either by brief or by oral argument

Seven other federal courts have extensively dealt with abortion regulations in the precise context of welfare payments. In each and every instance, the courts have denounced the denial and exclusion of medical welfare assistance for abortions and have concurrently advanced the rights of the indigent patient to equal protection of the laws and, specifically, to the right of welfare assistance for abortion.

The first case to rule on this exact issue was *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F.Supp. 496 (E.D. N.Y. 1972), *affirmed sub nom. Ryan*, etc. v. *Klein*, et al., 412 U.S. 924 (1973). In *Klein*, a three judge panel held that a limitation on state Medicaid payments for those abortions which were "*medically indicated*" was constitutionally invalid. That constitutionally void wording is the exact terminology relied upon here by petitioner Singleton to deny in an arbitrary and capricious manner Medicaid assistance payments for otherwise eligible welfare recipients.

The three judge panel in *Klein, supra*, unanimously held,

> "Pregnancy is a condition which in today's society is universally treated as requiring medical care, prenatal, obstetrical and post-partum care, and undeniably it is provided under the Medicaid program as 'necessary' medical assistance although pregnancy is not an abnormal condition, nor does the medical assistance in child birth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance. The pregnant woman may not be denied necessary medical assistance because she has made an unwarrantedly disfavored choice, and no other basis appears here for denying medical assistance. Eisenstadt v. Baird, 1972, 405 U.S. 438, 452-453, 92 S.Ct. 1029, 31 L.Ed.2d 349. State law articulates no policy that authorizes disfavoring one choice, and none other than the invalid argument based on the word 'necessary' is advanced. The 1970 amendment to Penal Law, § 125.05, removing the stigma of criminality from abortional acts performed within twenty-four weeks of the commencement of pregnancy, denies to the public authorities in New York any basis, in the administration of the public health services, for

differentiating between the two classes of justified abortional acts defined in the amended statute. Beyond that, it may well be that *a still more fundamental right is infringed whenever an attempt is made by statute or rule to deny, or, as here, substantially to interfere with, the pregnant woman's interests in freely determining whether or not to bear a child.*" Abele v. Markle, D.Conn. 1972, 342 F.Supp. 800, 804.

> *The directive, and the State statute, if interpreted as mandating the Commissioner's directive, would deny indigent women the equal protection of the laws to which they are constitutionally entitled. They alone are subjected to State coercion to bear children which they do not wish to bear, and no other women similarly situated are so coerced. Other women, able to afford the medical cost of either a justifiable abortional act or full term child birth, have complete freedom to make the choice in the light of the manifold of considerations directly relevant to the problem uninhibited by any State action. The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child. She is denied the medical assistance that is in general her statutory entitlement, and that is otherwise extended to her even with respect to her pregnancy. She is thus discriminated against both by reason of her poverty and by reason of her behavioral choice. No interest of the State is served by the arbitrary discrimination; it reflects no genuine exclusion from benefit by operation of a classification founded on an identifiable state interest served by the denial of medical assistance. Certainly the denial of medical assistance does not serve the State's fiscal interest, since the consequence is that the indigent may then apply for prenatal, obstetrical and post-partum care and for prenatal support for the unborn child. Nor does the denial of medical assistance serve any supposed interest of the State in*

discouraging even justifiable acts of abortion; even if there were assurance that there is such a State interest—and the contrary appears to be the case—it could not be advanced by singling out the indigent for the species of discouragement here attempted. Boddie v. Connecticut, 1971, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113; King v. Smith, 1968, 392 U.S. 309, 333-334, 88 S.Ct. 2128, 20 L.Ed.2d 1118; *cf.* Eisenstadt v. Baird, *supra*, 405 U.S. at 452-453, 92 S.Ct. 1029, 31 L.Ed.2d 349. (Emphasis supplied). (347 F.Supp. at pp. 500-501).

As noted, *Klein, supra,* was affirmed by this Honorable Court. The applicability of *Klein, supra,* takes on even greater significance in light of the subsequent decisions of *Roe,* et al. v. *Wade, supra,* and *Doe,* et al. v. *Bolton,* et al., *supra,* on January 22, 1973.

In the first medicaid case, post *Roe,* et al. v. *Wade, supra,* and *Doe,* et al. v. *Bolton,* et al., *supra,* the court with Chief Judge Willis W. Ritter, presiding, considered *Doe,* et al. v. *Rose,* etc., 380 F.Supp. 779 (D.Utah, 1973). The case directly concerned the administration of a state Medicaid program in respect to abortions. Defendant, as Executive Director of the Utah State Department of Social Services, had required as a pre-condition for payment that any abortion performed upon a recipient of Medicaid be for "therapeutic" purposes. The court granted plaintiffs' Motion for Summary Judgment, enjoining and prohibiting the defendant, his agents and employees from requiring such a precondition when abortions were performed on eligible Medicaid recipients. In so holding, the court definitively pinpointed the germane issues in its conclusions of law,

"4. Pursuant to the provisions of Section 1396a (a) (10) and (13) of Title 42, U.S.C., the defendant, his agents and employees are required to administer the State Medicaid Plan so as to provide, pursuant to Section 1396d

(a) (1) and (5) of Title 42, U.S.C., in-patient hospital care and necessary physician care to the plaintiffs as Medicaid recipients.

5. The defendant, his agents and employees submitted, pursuant to Section 1396 of Title 42, U.S.C., a Medicaid Program in which they stated that they would provide in-patient hospital care and necessary physician care to the plaintiffs as Medicaid recipients.

6. Each of the plaintiffs has a constitutionally protected right to receive an abortion.

7. Defendant, his agents and employees are without authority, under the provisions of subchapter XIX of the Social Security Act of 1935, as amended, Section 1396, et seq., of Title 42, U.S.C., and in particular, Sections 1396a (a) (10) and (13) and Sections 1396d (a) (1) and (5) of Title 42, U.S.C., to deny to the plaintiffs abortions based upon whether or not they are 'therapeutic.'

8. The plaintiffs will be denied Equal Protection of Law if the defendant, his agents and employees are permitted to discriminate between 'therapeutic' and 'non-therapeutic' abortions in the administration of the Medicaid Program.

9. The defendant, his agents and employees should be enjoined and prohibited from requiring as a precondition for payment that all applications for abortions by Medicaid participants be submitted to the defendant, his agents and employees for approval prior to the performance of said abortions.

10. The defendant, his agents and employees should be enjoined and prohibited from requiring as a precondition for payment that abortions being performed upon Medicaid recipients be 'therapeutic.'

11. The plaintiffs should be awarded the costs of the action." (380 F.Supp. at pp. 781-782).

On June 27, 1974, an unanimous panel of the United States Court of Appeals for the Tenth Circuit affirmed, *Doe* et al. v. *Rose*, etc., 499 F.2d 1112, 1115-1116 (10th Cir. 1974). The court held,

> "We see no need to here review in detail the nature of the federal-state relationship in the broad field of welfare benefits for the indigent. It is sufficient to simply note that a state need not, in the first instance, participate at all in the various federal welfare programs, and that should a state decide to participate, then the degree of its participation is also a matter to be determined by the state. However, once a state elects to participate in a federal welfare program, it must follow federal statutes and regulations and must also administer the program in a constitutional manner. *See* Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), and King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). In fact, even a state welfare program funded entirely by the state must be administered in a manner consistent with the United States Constitution.
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> . . .
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> Without analyzing in depth Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), a contrary holding in the instant case would in our view fly in the face of those two cases. The Supreme Court's decisions in *Wade* and *Bolton* clearly indicate that in the absence of a compelling state interest a state may not bar all abortions, except those necessary to protect the health of the mother, regardless of the trimester. A statute thus limiting abortions violates the constitutional right to privacy of pregnant women, at least those in their first or second trimesters, who during the first six months of their pregnancy have a qualified right to terminate their pregnancies."

In *Doe* v. *Rampton*, et al., 366 F.Supp. 189 (D. Utah 1973) plaintiffs challenged several Utah statutes which severely restricted the constitutionally protected rights of women, including welfare recipients, to abortion. The statute in question provided in pertinent part,

> "76-7-314. Public assistance grants or state funds not used for abortions—Abortion not a condition to receipt of assistance.—No public assistance grant, medical or otherwise, may be used for an abortion. No state funds may be used, expended or paid for abortions except where an abortion is necessary to save the life of the pregnant woman or to prevent serious and permanent damage to her physical health." (366 F.Supp. at p. 197).

In scrutinizing and assessing the constitutionality of this statute, the three judge court in *Rampton, supra*, authoritatively and unanimously held,

> *"Section 76-7-314 is invalid because it would limit exercise of the right to an abortion by the poor in all trimesters, for reasons having no apparent connection to health of the mother or child. The State may not so use its Medicaid program to limit abortions."* (Emphasis supplied). (366 F.Supp. at p. 193).

The explicit holding in *Rampton, supra*, is worthy of considerable weight in the case at bar and is patently analogous thereto.

Following the solid groundwork laid down in *Klein, supra*, a three judge panel recently upheld the rights of welfare recipients and participants under the Pennsylvania Medical Assistance Program (PMAP) in *Doe*, et al. v. *Wohlgemuth*, et al., 376 F. Supp. 173 (W.D. Penn. 1974), *vacated and remanded on other grounds*, 505 F.2d 186 (3rd Cir. 1974). That suit involved a challenge to the refusal by the Pennsylvania Department of Public Welfare and certain of its officers and/or administrative representatives to provide reimbursement for the costs of abor-

tions for welfare recipients; except in narrowly defined situations where various criterion were met, including "documented medical evidence" that continuation of the pregnancy may threaten the health or life of the mother.

In reaching the merits and holding for the plaintiffs, the District Court in *Wohlgemuth, supra,* stated early in its opinion,

> "Whatever may be the private view of an individual or group of individuals, or the members of this Court, *we are bound by the now established principle of law that a negation of an individual's choice in the matter of abortion during the first trimester of pregnancy is an unwarranted invasion of that person's fundamental rights as established by the Fourteenth Amendment to the Constitution of the United States.*" (Emphasis supplied). (376 F.Supp. at p. 179).

In reaching plaintiffs' claim in *Wohlgemuth, supra,* that Pennsylvania's challenged policies constituted a denial of constitutionally safeguarded rights, the court noted that *Roe,* et al. v. *Wade, supra,* was dispositive of the issues presented and that,

> "[S]ince the PMAP serves to regulate the elective decision of the pregnant woman and her doctor *throughout the three trimesters,* they are too broad and overreach the State's legitimate interest." (376 F.Supp. at pp. 189-190).

Continuing, the *Wohlgemuth* court held, in language of particular pertinence to the instant case,

> "We hold that the State's decision to limit coverage to 'medically indicated' abortions, as arbitrarily determined by it, is a limitation which promotes no valid State interest. In the PMAP, the State has instituted a program to provide benefits to the poor; the State has excluded certain of the poor from the program; the exclusion denies Medical Assistance benefits to otherwise eligible applicants solely because they have elected to have an abortion, and the

> State has been unable to show that the exclusion of such persons promotes a compelling State interest.
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> • • •
>
> We further conclude that the State may not, by means of any statutes, regulations or procedures similar to those comprising the Pennsylvania Medical Assistance Program, unlawfully impinge upon the fundamental rights of any pregnant woman during the first three months or trimester of her pregnancy.
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> • • •
>
> It is, therefore, the meaning of this Opinion that the Commonwealth has invidiously discriminated among persons equally eligible for assistance against those who seek medical treatment within the confines of a fundamental right." (376 F.Supp. at pp. 191-192).

Clearly, petitioner Singleton cannot dispute that the denial of Medicaid payments for abortions performed on eligible welfare recipients in Missouri is to any degree either a less invidious discrimination against the indigents of Missouri or a less blatant encroachment into the confines of the well established, fundamental rights of women and their physicians to make and to effectuate the abortion decision free of unwarranted state intrusion. *Roe,* et al. v. *Wade, supra.*

Again in *Roe,* et al v. *Norton,* et al., 380 F.Supp. 726 (D. Conn. 1974) the court voided a Connecticut statute requiring abortions to be "recommended as medically or psychiatrically necessary" for Medicaid payment eligibility. As the court so aptly noted,

> "The choice of service, whether childbirth or abortion, was a matter between patient and physician. Either service is equally eligible for Medicaid payment. The defendants do not contend that the expenses of childbirth are not necessary even though the patient could have elected an abortion. By the same token, the expenses of an abortion are

no less necessary simply because the patient could have elected childbirth.

* * *

While the constitutional right to have an abortion does not necessarily carry with it a constitutional right to a free abortion, a statute that provides payment to the needy for medical expenses would encounter constitutional obstacles if it were construed to weight the choice of a pregnant woman against electing the abortion that is her constitutional right to choose. Government is not required by the Constitution to pay for any medical service, but once it decides to provide payments, it must not unduly disadvantage those who exercise a constitutional right." (380 F.Supp. at pp. 729-730).

Lastly, are *Doe*, et al. v. *Westby*, et al., 383 F.Supp. 1143 (D.S.D. 1974), *vacated and remanded on other grounds*, 43 L.Ed. 2d 648 (1975) and *Doe*, et al. v. *Myatt*, et al., — F. Supp. — (D.N.D., No. A3-74-48, Jan 27, 1975).

The identical issue of finding a denial of equal protection by the state's unconstitutional favoring of broad and inclusive pregnancy and maternity services, excluding only elective abortions, has been unanimously supported in the similar and analogous context of public hospitals. Seven federal and one state appellate courts have so held. (See, *e.g.*: *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 [D.D.C. 1970], *affirmed*, 434 F.2d 423 [D.C.C. 1970], and *affirmed*, 434 F.2d 427 [D.C.C. 1970]; *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 [8th Cir. 1974], *cert. denied*, 42 L.Ed. 2d 136 [1974]; *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 [1st Cir. 1974], *cert. denied*, 42 L.Ed. 2d 837 [1975]; *Doe* v. *Mundy*, et al., 378 F.Supp. 731 [D.Wis. 1974], *affirmed without published opinion*, 510 F.2d 976 [7th Cir. 1975]; *Doe*, et al. v. *Poelker*, et al., — F.2d — [No. 75-1069, 8th Cir., Apr. 14, 1975]; *Santiago* v. *Colon*, et al., —

F.Supp. — [D.P.R., No. 74-362, Aug. 6, 1974]; *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 [D.Neb. 1974]; and *Roe* v. *Arizona Board of Regents*, — P.2d — [Ariz. Ct. App., No. 2CA-Civ. 1834, Apr. 21, 1975]).

Petitioner cites not a single case to the contrary dealing with the issue at hand—the denial by a state to its citizens of assistance for a broad range of pregnancy and maternity benefits—with the singular and intentional exclusion of any benefits for those women who desire to exercise their constitutional right to terminate pregnancy.

Petitioner by way of arguing the merits, offers too little, too late.

CONCLUSION

In light of the proper course of action taken by the Appellate Court in an effort to promote judicial administration and efficiency in a manner designed to grant fairness to all parties; in light of petitioner's unwarranted refusal to discuss the merits until his inappropriate discussion of the same within his petition for writ of certiorari and in light of the host of and unbroken line of authorities supporting the position of respondents, respondents respectfully pray that petitioner's "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit" be denied forthwith.

Respectfully submitted

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Certificate of Service

I, the undersigned attorney for respondents and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing "Respondents' Brief in Opposition to 'Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit' " upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to Mr. Michael L. Boicourt, Assistant Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101, Attorneys for Petitioner.

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